WORKERS COMPENSATION SEMINAR OUTLINE

REPETITIVE USE INJURIES

I. Repetitive Use - The "Arising Out Of" Requirement

Kansas has long recognized that an employee may sustain personal injury by accident arising out of and in the course of employment - regardless of whether the accident occurs at a specific date and time or through a series of micro-traumas.

Under the pre-May 15, 2011 provision of K.S.A. 44-508, "accident" is defined as:

> "... an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment."

In contrast, the 2011 change in the Kansas Workers' Compensation Act defines "accident" as:

> "... an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form."

Repetitive trauma is defined separately. Under the new Act, it refers to:

> "... cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.
> "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto."

It is important to note that the standards for proving that an accident occurred are now different from the standard for proving that an accident through a series of micro-traumas - or repetitive traumas - has occurred.

Under the old law, the elements of "accident" - which included accident by repetitive trauma - were not to be construed in a strict or literal sense. Now, a repetitive trauma must be shown by diagnostic or clinical tests. I assume this means that an individual cannot simply prove that they were injured through repetitive trauma by their own testimony.

More importantly, the standard for proving that a repetitive trauma arises out of and in the course of employment is now different. Of course, whether the case is an old law case or a new law case - a person must prove that an accident arises out of and in the course of employment.

"Arising out of" and "in the course of employment" have separate and distinct meanings. They are conjunctive and each condition must exist before compensation is allowable.

The phrase "in the course of employment" relates to the time, place and circumstances under which an accident occurs. This means that the injury happened while the workman was at work and in the employer's service. See Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

An accidental injury must also "arise out of" employment. Under the old law, for an accident to arise out of employment, there must be a causal connection between the accident and the nature, conditions, obligations and incidents of employment. As the Newman Court states:

> "... an injury arises out of employment when there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. ... An injury arises out of if it arises out of the nature, conditions, obligations and incidents of employment."

The new law sets up differing criteria concerning the requirement of "arising out of" for a single date of accident versus a repetitive trauma. Of course, regardless of whether it is a single date of accident or a repetitive trauma, the event or events must be the prevailing factor in causing the injury.

"Personal injury" and "injury" means any lesion or change in the physical structure of the body causing damage or harm thereto. "Personal injury" or "injury" may occur only by accident, repetitive trauma or occupational disease. An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

However, if the injury is by repetitive trauma, it arises out of employment only if:

> "(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life; (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment."

This standard may not be that different than how some Appellate Court interpreted this requirement under the old law. For example, in Anderson v. Scarlett Auto Interiors, 31 KA2d 5, 61 P.3d 81 (2002), the Court stated:

> "An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment."

The language in Anderson seems to be equivalent to the statutory requirement of (I) as stated
above.

The significance of the increased risk requirement is illustrated by the Missouri experience. In Missouri, 287.020.3(2) reads as follows:

> "An injury shall be deemed to arise out of and in the course of the employment only if:
> (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
> (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."

This increased risk standard was interpreted by the Missouri Supreme Court in Johme v. St. John's Mercy Health Care, Case Number SC922113 (decided by the Missouri Supreme Court May 29, 2012). Sandy Johme worked at St. John's Mercy Health Care as a billing representative. Her work involved typing charges at a computer in an office. Her desk was about 30 steps from an office kitchen where St. John's provided a coffee station for use by all employees. It was customary, in the office, that the employee who took the last cup of coffee would make another pot of coffee. Johme was injured in a fall that occurred in the kitchen after she made a pot of coffee to replace the pot

from which she had taken the last cup. Consistent with office policies, Johme remained clocked in to her job during her coffee break and while making the coffee. There is no issue that she was clocked in as an employee at the time of her fall.

Johme explained that she was standing at the coffee pot when she turned to put coffee grounds into the trash, twisted her ankle and fell off her shoe. She fell backwards and landed on the floor. As a result of this fall, Ms. Johme suffered a fracture of the right hip or pelvis. The employer denied personal injury by accident based on the aforementioned statute. The employer felt that the personal comfort doctrine no longer applied to make this claim compensable in light of the increased risk standard of 287.020.3(2).

The Labor Commission found the claim compensable based on the earlier Court of Appeals case - Pile v. Lake Regional Health System which stated the following test for determining the application of this section:

> "The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life."

The Missouri Supreme Court disagreed with this analysis. Citing the earlier Supreme Court case of Miller v. Missouri Highway and Transportation Commission, 287 S.W.3d 671 (Missouri 2009). The Court explained:

> "An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved - here, walking - is one to which the employer would have been exposed equally in normal non-employment life. The injury here did not occur because the employee fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the

> course of employment, but did not arise out of employment. Under sections 287.020.2, .3 and .10 as currently in force, that is insufficient to award workers' compensation."

The Court went on to state:

> "Miller instructs that it is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is only compensable if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in "normal nonemployment life."

The Supreme Court found that the risk of Johme twisting her ankle and having her shoe fall off while in her workplace making coffee was no different than the risk she would have outside of her workplace in non-employment life. Thus, this injury did not arise out of and in the course of employment.

Obviously, the Kansas law is different than the Missouri law. It's important to note that, with a single date of accident, the Kansas statute requires only a causal connection between the conditions under which work is required to be performed and the resulting injury. The Kansas statute states:

> "(B) An injury by accident shall be deemed to arise out of employment only if: (I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment."

Clearly the risk analysis is different between a single date of accident and repetitive trauma.

The causal connection language for a single date of accident is simply a restatement of our current law. For example, in Bryant v. Midwest Staff Solutions, Inc., 292 Kan. 585, 257 P.3d 255 (2011), the Supreme Court stated:

> "In determining whether an injury arose out of employment, the focus of inquiry is whether the activity that resulted in the injury was connected to, or was inherent in, the performance of the job."

This case is especially interesting in that Midwest Staff Solutions, by focusing on the

normal activities of day-to-day living language, made the argument that the injury had to be a result of an activity that was unique to work. If the physical activity occurred both at work and in non-work situations, it was not compensable. The Court does a nice job of looking at a number of different

Court cases that talk about the risk analysis and whether the risk must be unique to the job, increased at the job or simply present in the job activities.

The Supreme Court indicated that they could not discern a consistent principle in the various opinions. Certainly no bright lined rule emerged from the analysis of the cases or from the plain language of the statutes.

Twisting and bending over are daily activities for workers as well as non-workers. So are lifting objects, cutting pieces of meat, typing on keyboards and walking and standing for extended periods of time. The Court went on to state:

> "Although no bright-line test for what constitutes a work injury is possible, the proper approach is to focus on whether the injury occurred as a consequence of a broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. ... Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on whether the activity that results in injury is connected to or is inherent in the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement - bending, twisting, lifting, walking or other bodily motions - but looks to the overall context of what the worker was doing - welding, reaching for tools, getting in and out of a vehicle or engaging in other work activities."

Under this analysis, if an individual strains their back when lifting a box at work, it does not matter that they also lift outside of work. However, if the worker injures their back from repetitively lifting at work - outside of a single work shift - they must show that they lift at work more than they lift outside of work.

The standard is not that the risk is peculiar to work; i.e., that they only lift at work but that they lift more at work than they lift at home.

There are a couple of Board of Appeals cases that discuss this increased risk standard at least at the preliminary hearing level.

In Tucker v. Alfalfa Pellets, LLC, (WCAB January, 2012), Docket Number 1,057,454,

the issue in the case is whether the claimant's alleged accident or accidents were the prevailing cause of the injury. On July 13, 2011, claimant was shoveling pellets into an auger with a scoop shovel to make a load of meal. While so engaged, he felt tenderness in his right shoulder. The next day, he was working with a pitchfork turning hay. He grabbed the pitchfork with his right arm and this caused a sharp pain in his right shoulder and tingling down the back of his right arm.

An MRI was later done which showed a right rotator cuff tear near the insertion into the humerus. The scan also revealed considerable underlying acromioclavicular hypertrophic changes.

The testimony from the evaluating physician - Dr. Reiff Brown - was that the tear in the right rotator cuff was a work-related event and that it was more probably true than not that the prevailing cause of the injury was the accident and that it resulted from repetitive trauma.

The Board member on the preliminary hearing found that the claimant had fulfilled his burden of proof to persuade the trier of fact that it was more probably true than not that the claimant injured himself through a series of repetitive traumas which commenced on July 13, 2011 and continued through July 14, 2011. The opinions of the treater and Dr. Brown were that the claimant's injury was related to the work and these opinions were uncontradicted. The fact that this gentleman had some acromioclavicular hypertrophic changes in his right shoulder did not - in and of itself - make the claim non-compensable. Therefore, the Board member found that the repetitive trauma of July 13, 2011 and continuing through July 14, 2011 was the prevailing factor in causing claimant's injury.

The Board member went on to point out that the duties of claimant's employment with the respondent included repetitive use of scoop shovels and pitchforks. These duties increased the risk of hazard of injury to which the claimant would not have been exposed in normal non-employment life.

Obviously this is a very clear-cut case in that most claimants would not be repetitively using a scoop shovel or a pitchfork in non-employment life.

In Jackson v. Lakepoint Nursing & Rehab [WCAB Oct. 2011], Docket Number 1,056,279, the Board addressed the prevailing cause of injury for a dietary aide and dishwasher. The claimant used her hands constantly in her job and started noticing pain in May, 2011. On May 20, 2011, the pain became worse and she reported it to her boss and filled out an incident report for problems with her right hand.

The company sent her to Dr. Norman on the same date of the incident report. Dr. Norman diagnosed acute inflammatory arthritis and opined that it was not work-related. He did place light duty restrictions on her and the employer told her not to return to work unless she was released with no restrictions. At her attorney's request, she saw Dr. Murati on June 8, 2011. Dr. Murati diagnosed bilateral carpal tunnel syndrome and right DeQuervain's syndrome. He felt that the claimant's work activities were the prevailing factor for these problems.

The claimant filed an application for hearing on June 9, 2011.

The Court ordered an independent medical evaluation with Dr. Do who diagnosed bilateral dorsal compartment tenosynovitis and possible right carpal tunnel syndrome. Claimant had a prior

left dorsal compartment release by Dr. Babb in 2007 but had been released to full duty following that surgery and had had no problems since that time.

Dr. Do felt that the claimant fit into the category of repetitive trauma and that her work activities were the prevailing factor for her condition. He indicated that, in normal day-to-day activities, the claimant would not be doing dishes for almost an entire nursing home breakfast and lunch; working 7:00 a.m. to 3:00 p.m.

The Board member found there was an increased risk from her employment and that it was the prevailing factor in causing the repetitive trauma injuries.

Another new law case using similar language is Goodson v. Goodyear Tire & Rubber Company, Docket Number 1,057,615. In this case, the claimant alleged that he suffered a back injury on August 19, 2011 and that the cause of the injury was repetitive lifting and carrying of liners and shelves weighing from 30 pounds up to - and including - 100 pounds.

Although this case mainly discusses violation of a safety rule, there is language regarding the increased risk factor. The Court noted:

> "Claimant's employment exposed him to an increased risk to injury. He testified that he repetitively lifted yellow liners, which weighed 35 pounds. He did not recall whether, on the date of his injury, he lifted double liners, which would weigh approximately 60 pounds. It is also significant that on the date of claimant's injury, he also booked tread. Booking tread required claimant to lift 20 pounds approximately 200 times during his shift. Simply put, claimant's employment exposed him to an increased risk of injury."

Another issue as to prevailing factor and how it is applied in multiple employments was raised in the cases of Mazouch v. U.S.D. 428, Docket Number 1,058,571 and in Mazouch v. Wal-Mart, Docket Number 1,058,572 which were consolidated for hearing.

In December, 1998, the claimant worked for U.S.D. 428 in the food service department. Due to her daughter's illness, the claimant reduced her hours at some point and then took on a second part-time job at Wal-Mart in July, 2010. At Wal-Mart, the claimant originally worked in the deli department before transferring to a cashier position and then into the clothing

department.

Claimant had a history of some numbness and tingling in both hands as far back as 2007 but, apparently, had no restrictions or limitations. In the fall of 2011, after school began, the claimant took on additional hours with U.S.D. 428 and began noticing a dramatic worsening of her symptoms. In October, 2011, her chiropractor sent her to a neurologist - Dr. Davis - who performed EMG/nerve conduction studies and diagnosed severe bilateral carpal tunnel syndrome.

On or about October 17, 2011, claimant reported her problems to her employer. Mr. Brungardt - with the District Administration Offices for U.S.D. 428 - instructed the claimant to also file a claim against Wal-Mart; which she did shortly thereafter.

Claimant was seen by Dr. Brown who opined that her work exposed her to an increased risk or hazard which she would not have been exposed to in normal life and that this increased risk was the prevailing factor in causing the repetitive trauma and need for medical treatment. He further opined that the claimant's work at U.S.D. 428 was the prevailing factor in 75% of her condition and the work at Wal-Mart was the prevailing factor for the remaining 25% of her condition.

The Board first had to determine a date of accident to determine which law applied since the claimant had symptoms for several years. Under the facts, the Board found a date of accident of October, 2011; after the claimant saw Dr. Davis and was diagnosed with bilateral carpal tunnel syndrome. Claimant then reported the problems to both U.S.D. 428 and to Wal-Mart within 28 days.

The Administrative Law Judge found the bilateral carpal tunnel claim compensable but only as to the claim against U.S.D. 428. Claimant argued that both claims were compensable, that, pursuant to K.S.A. 44-503, liability should be apportioned against multiple employers and, finally, that the prevailing factor statute cannot be interpreted to mean a larger contribution by one (1) employer lets the other employer off the hook. Of course, Wal-Mart contended that prevailing factor does apply between employers and that, whichever employer contributed the greater degree to claimant's injuries should be responsible for all benefits.

The Board member noted that, prior to May 15, 2011, K.S.A. 44-503a provided that it applied where an "employee sustains an injury by accident which arose out of and in the course of the multiple employment...". Effective May 15, 2011, K.S.A. 44-503a was amended to remove "by accident" so that it now reads where the "employee sustains an injury which arose out of and in the course of the multiple employment...". This shows an intent to include repetitive trauma claims and both employers are liable for their portion of benefits.

II. Determining the Legal Date of Accident

As most of you are aware, it has long been difficult to determine the legal date of accident when a series of micro-traumas occurs. The legal date of accident is that one (1) date which is

necessary in order to determine whether timely notice has been given, timely written claim has been given (under the old law), the average weekly wage and a variety of other issues.

The Appellate Courts attempted to create a bright-line rule to determine the date of accident for a series of micro-traumas. Unfortunately, this bright-line rule did not apply in all circumstances.

In 2005, the Legislature attempted to deal with this problem by enacting K.S.A. 44-508(d) which - in part - states:

> "In cases where the accident occurs as a result of a series of events, repetitive use, cumulating traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing."

This statutory provision has been changed under the new Act. The statute now indicates as follows:

> "In the case of injury by repetitive trauma, the date of injury shall be the earliest of: (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma; (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma; (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought. In no case shall the date of accident be later than the last date worked."

A comparison of these two (2) statutory provisions may help in determining how the new law is interpreted.

It should be noted that, initially under the old law, the preference for determining the date of accident is the date the employee is taken off work by the authorized physician or the date the employee is restricted from performing work which was the cause of the condition by the authorized physician. Only if neither of those two (2) events occur do the alternatives for determining the date of accident come into effect.

Under the new law, there is no preference for the first two (2) alternatives.

Second, it should be noted that, under the old law, the word "authorized" is used. In other words, the date of accident shall be the date the "authorized" physician takes the employee off work or the date the "authorized" physician restricts the employee from performing work.

The statute now says that it is the date "a" physician takes the employee off work.

This brings up the question whether a personal physician who recommends that a claimant is taken off work or recommends that a claimant is restricted from work is sufficient to trigger the statutory provisions. Also, there is a question as to whether this is true regardless of whether the
employee is actually taken off work or actually restricted or merely that the recommendation be made.

The old law indicates that, when the employee is not taken off work or restricted by the authorized treating physician, it should be the earliest of the date upon which the employee gives written notice to the employer of the injury or the date the condition is diagnosed as work-related; provided that the fact is communicated in writing to the injured worker.

The third alternative under the old law has been eliminated in the new law. Instead it indicates that a third option to determine the date of accident is the date the employee, while employed by the employer against whom benefits are sought, is advised by "a" physician that the condition is work-related. This is very similar to the old law provision although there is no longer the requirement that this fact be communicated in writing to the injured worker.

The old law provision also indicates that the date of accident cannot be the date of the regular hearing nor the day before the regular hearing. However, there is no indication that the legal date of accident can't be after the employee stops working for the employer. See Saylor v. Westar Energy, Inc., 256 P.3d 828 (Kan. 2011).

This possibility is eliminated under the new law in that Section 4 indicates:

> "...the last day worked, if the employee no longer works for the employer against whom benefits are sought."

Interestingly, if the employee no longer works for the employer against whom benefits are being sought, the fact that that employee had been taken off work for repetitive trauma or had been restricted for repetitive trauma or had been told that the condition was work-related is irrelevant. If
the employee no longer works for the employer against whom benefits are being sought, the legal date of accident in repetitive trauma is always the last day worked.

An interesting case on the determination of the legal date of accident in repetitive trauma cases is Verbanic v. KC Board of Public Utilities, Docket Number 1,058,378 (WCAB May 24, 2012). This is a very fact-intensive case where determining the legal date of accident affected whether appropriate notice should be given. It is a good example of how the parties and the Court must look at each particular fact - and apply them to the statute - to determine the correct date of accident before making a determination as to notice.

III. Notice for Repetitive Trauma

This legal date of accident then determines whether timely notice has been given. The new statute indicates that notice of the injury by accident or by repetitive trauma must be given to the employer by the earliest of the following dates:

1. Thirty (30) days from the date of accident or date of injury by repetitive trauma;

2. If the employee is working for the employer against whom benefits are sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, twenty (20) calendar days from such medical treatment is sought; or

3. If the employee no longer works for the employer against whom benefits are being sought, twenty (20) days after such employee's last day of actual work.

There is at least one (1) preliminary hearing decision that requires notice be given before the legal date of accident.

In Ray v. Goodyear Tire & Rubber Company, (WCAB April, 2012), Docket Number 1,057,893, the respondent argued that the claimant did not provide timely notice of the date of accident.

The claimant was employed by the respondent as a Banberry trucker. He held this title for the last 25 years and worked for the respondent for 41 years. The claimant testified that he began having problems with his left shoulder in late March or early April, 2011. He did not report the problem to his employer but continued to work until approximately June 13, 2011. At that time, he went to his family physician for a "quick fix". X-rays were taken and an appointment was made for six (6) weeks later for the claimant to see Dr. Bradley Poole. While the claimant waited for the appointment with Dr. Poole, his shoulder problems continued to worsen. The claimant believed that this was due to his job with the respondent.

The claimant testified that he knew his shoulder problems were related to his work in April, 2011 but that he had no way to prove it. In addition, his family physician told him that there was probably nothing to worry about so the claimant did nothing in terms of notifying his employer.

The claimant then met with Dr. Poole on July 20, 2011. He was given the options of either having an injection or an MRI to see what was going on. He chose the MRI which was done on August 20, 2011. The MRI showed a torn rotator cuff. Surgery was recommended to repair the tear. The procedure was performed on September 12, 2011. The claimant continued to work up until the date of surgery with no restrictions.

It wasn't until the claimant met with Dr. Poole that he decided to file for workers' compensation benefits. This was a result of a verbal conversation with Dr. Poole. Nothing was provided in writing.

The claimant provided written notice to the employer of his shoulder problems - indicating that they were work-related - on approximately September 20, 2011. At that time, he completed an Associate Report of Incident which indicated the date of accident as April 1, 2011. This was the date that the nurse told him to put on the paperwork. The claimant acknowledged that this date was also the start of his shoulder pain.

The Board member deciding this case looked at the provisions of K.S.A. 44-508e to determine the appropriate legal date of accident. The Board member found that the claimant had neither taken off work nor had been placed on modified or restricted duty. In addition, the claimant continued to be employed by the respondent. Therefore, the only possible date of injury - under K.S.A. 2011 44-508e - involves when the claimant was advised by the physician that the condition was work-related.

The record did not support a finding that the claimant was advised by Dr. Thomas of a work-related series of injuries during the June, 2011 examination. Additionally, when the claimant met with Dr. Poole on July 20, 2011, they discussed the proper course of action with the claimant being given the option to receive an injection in his shoulder or undergo an MRI. However, the claimant did not testify regarding a causation conversation at that time. Approximately one (1) week later, the claimant was advised that he needed surgery on his shoulder for a "torn cuff". Again, the claimant did not testify whether Dr. Poole told him at that time that the injury was work-related. The claimant testified that, ultimately, he did ask Dr. Poole if his problem was work-related and Dr. Poole agreed that it was. That conversation took place the week before the claimant's September 12, 2011 surgery.

Therefore, under K.S.A. 2011 44-508e, the Board member found that the date of injury in this matter occurred during the week prior to the claimant's surgery on September 12, 2011. The exact date of injury cannot be determined.

After the Board member found the date of accident to be somewhere around September 7,

2011 through September 12, 2011, the Board then looked at the issue of notice and, specifically, the provisions of Subsection (B). That provision states:

> "If the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; ..."

Based on this provision, the Board member found that the claimant failed to give timely notice of his repetitive trauma injuries to his left shoulder. The Board member felt that the claimant had determined that he was suffering from a work-related shoulder problem shortly after meeting with Dr. Thomas in June, 2011. He then proceeded to an examination with Dr. Poole on July 20, 2011; convinced that he was suffering from a work-related injury or injuries. Thus, under K.S.A. 2011 Supp., 44-520(a)(1)(B), notice was required within twenty (20) days of the July 20, 2011 examination with Dr. Poole. Claimant acknowledged that notice was not provided until September 20, 2011.

Thus, notice of a repetitive trauma was not timely provided.

There are literally dozens of old law Board cases wherein the Board states that, before determining whether notice is timely, the legal date of accident has to be determined. The date that notice has to be given is after the legal date of accident. Here, the Board member goes through the analysis to determine the legal date of accident but then makes a finding that notice had to be given before the accident.

Of course, there are numerous old law cases where the Board has found that notice during the series of accidents is sufficient even though it occurs before the legal date of accident. This Board member evidently feels that - under the new law - notice before the legal date of accident may be required.

A contrary case to Ray v. Goodyear Tire & Rubber Company, is Vergara v. Perfekta, Inc., Docket Number 1,059,159. In this case, a different Board member reached a different conclusion on the notice issue than that reached in the Ray case. In Vergara, the claimant began having problems with his back in September, 2011 after picking up a vise. Claimant continued working and his condition continued to worsen after he left work on December 22, 2011.

Claimant first sought medical treatment with his personal physician on September 30, 2011; indicating that he had been having back pain for a few days and had to "force myself to work". He was referred to Dr. Eyster who treated him but did not place restrictions on him. On December 8, 2011, Dr. Eyster noted that the claimant was frustrated because he did well on weekends but not at work.

The claimant reported his injury on December 22, 2011.

On February 27, 2012, the claimant - at the request of his attorney - was seen by Dr. Murati. Dr. Murati specifically indicated that the claimant's back condition was a direct result of the injuries that occurred each and every day to December 22, 2011. Dr. Murati placed restrictions on the claimant.

The Board member deciding this case found that the claimant sustained a series of repetitive traumas and, by definition - pursuant to K.S.A. 44-508(e) - the date of accident was the last day worked; i.e., December 22, 2011. Turning to the notice issue, the Board noted that the claimant first sought medical treatment in September, 2011 and did not report the accident until December 22, 2011. However, this Board member found that K.S.A. 44-520(a)(1)(B) must be read together with K.S.A. 44-508e and that it is unrealistic and illogical to require notice before the date of accident. The twenty (20) day notice requirement should be read to mean twenty (20) days from the date the repetitive trauma becomes an injury pursuant to K.S.A. 44-508(e). See also Walker v. General Motors, LLC, Docket Number 1,059,354.

IV. Determining Which Law Applies

The final issue, when dealing with a series of accidents, concerns how to deal with the case where there is an overlap between the old law and the new law. In other words - applying the old law provisions results in a date of accident after May 15, 2011. However, applying the new law provisions results in a date of accident prior to May 15, 2011.

This particular problem has come up on a number of different occasions. In each case, the Board has found that the old law provisions apply. Applying the new law would require an impermissible retroactive deprivation of substantial vested rights.

For example, in Burnom v. Cessna Aircraft Company, (WCAB November, 2011) Docket Number 1,056,443, the Administrative Law Judge found the date of accident for claimant's alleged series of micro-traumas to be April 25, 2011. This was the date the Administrative Law Judge found that the claimant last worked for the respondent.

The respondent argued that the claim would be governed by the new law under which the date of claimant's alleged series of accidents could not be later than the last day worked; i.e., April 21, 2011. Notice was not provided until June 21, 2011 when the claimant's counsel served a demand letter on the respondent. By that time, the claimant's notice would likely be untimely and the claim would be noncompensable for that reason.

The claimant contended that the old law applied because her last injurious trauma occurred on April 21, 2011 but that the correct legal date of accident for the series was June 21, 2011 - the date that the claimant gave written notice of the claim to the respondent.

The Board member agreed that the old law applied and that notice was timely. However,

the correct legal date of accident was not April 21, 2011 but, rather, June 21, 2011. Although this legal date of accident was after the effective date of the new law; i.e., May 15, 2011, the new Act did not apply because such would require an impermissible retroactive deprivation of substantial vested rights.

The Supreme Court made the following comment in Bryant v. Midwest Staff Solutions, Inc., 292 Kan. 585, 257 P.3d 255 (2011):

> "As a preliminary matter, we note that during the 2010 legislative session the Kansas Legislature passed and the Governor signed into law significant changes to the Kansas Workers Compensation Act. See Substitute for H.B. 2134, effective May 15, 2011. These changes included the addition of a requirement that an accident or cumulative trauma be the prevailing factor in causing a compensable injury, medical condition, or resulting impairment. The new law also introduces several exclusions from compensability, including "triggering or precipitating events" and "aggravations, accelerations, or exacerbations of a preexisting condition." The amended statute removes any reference to disabilities resulting from the "normal activities of day-to-day living," although it addresses situations when employment increases risks or hazards to which workers would not have been exposed "in normal non-employment life." Substitute for H.B. 2134, sec. 5.
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> ...
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> As a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operative retroactively. Owen Lumber Co. V. Chartrand, 276 Kan. 218, 220, 73 P.3d 753 (2003). Even if the legislature expressly states that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application. Substantive rights include rights of action "for injuries suffered in person." Harding v. K.C. Wall Products, Inc., 250 Kan. 655, 667, 831 P.2d 958 (1992) (citing the Kansas Constitution Bill of Rights, § 18). The retroactive application of laws that adversely affect substantive rights violates a claimant's constitutional rights, because it constitutes a taking of property without due process of law. Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 190, 883 P.2d 1177 (1994).
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> Nothing in the language of the Substitute for H.B. 2134 suggests that the legislature intended that the sections relevant to the present case be applied retroactively. In fact, the legislature singled out

> one section, new K.S.A. 44-529(c), for retroactive application and was silent about the application of the remainder of the statutory amendments. In addition, Bryant has a vested right to seek compensation for his injury, and retroactive application would violate due process."

In Burnom, the Board member found that there was no indication in the new Act that the series of micro-traumas language was intended by the Legislature to have a retroactive effect. Moreover, it is self-evident that the cited provisions are not merely procedural in nature but, rather, affect substantive vested rights. A number of rights and obligations in a workers' compensation claim depend directly on the date of accident including the weekly compensation rate, the date upon which an application for hearing must be filed with the Division and when notice has to be given. To apply the provisions of the new Act to this claim would constitute a deprivation of property without due process and would, therefore, be unconstitutional. See also: Whisenhand v. Standard Motor Products, Inc., (WCAB January, 2012) Docket Number 1,056,966).